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CHOICE-OF-LAW RULES IN BANKRUPTCY: AN OPPORTUNITY FOR CONGRESS TO RESOLVE CONFLICTING APPROACHES

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INTRODUCTION

When a dispute arises and the parties are from different states or more than one law within a single jurisdiction applies to the dispute, which law should govern? Choice-of-law rules answer that question. In the early years following the founding of the United States, state law was fairly uniform, so it usually did not matter which state's law was applied.¹ However, in subsequent years, states enacted statutes that conflicted with those of their sister states.²

Choice-of-law "is a device for choosing among states' substantive laws."³ Writing in 1927, Justice Benjamin Cardozo called conflict of

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¹ Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 11 (1945). Justice Jackson's article, which was given as the fourth annual Benjamin N. Cardozo Lecture on December 7, 1944, provides excellent insight into the origins of the Full Faith and Credit Clause and the Supreme Court's full faith and credit jurisprudence through the early 1940s.

² *Id.*

³ Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21, 40 (1998).

laws “one of the most baffling subjects of legal science.”⁴ At that time, American conflict of laws jurisprudence was in its infancy, and U.S. courts were following a single choice-of-law methodology.⁵ Over twenty-five years later, Dean William Prosser wrote, “[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”⁶ Today, resolving conflicts between competing state laws is a complex endeavor because states have adopted a variety of choice-of-law approaches.

Conflicts in bankruptcy cases usually occur when the debtor and creditors are from more than one state, but they can also involve a conflict between U.S. bankruptcy law and a foreign nation’s bankruptcy law.⁷ In determining the parties’ rights in a bankruptcy proceeding, the bankruptcy court must first determine whether state or federal law governs the parties’ rights.⁸ If state law governs a right, then the court must determine which state’s law applies.⁹ For example, a court will look to state law to determine whether a contract, on which a creditor’s claim is based, is valid.¹⁰ If the contract was made

⁴ BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (Columbia Univ. Press 1945) (1928).

⁵ The terms approaches and methodologies are all used in describing various choice-of-law schemes. Generally, the choice-of-law approaches or methodologies provide the broad choice-of-law standards, which include specific choice-of-law rules for various areas of law.

⁶ William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

⁷ Patrick J. Borchers, *Choice of Law Relative to Security Interests and Other Liens in International Bankruptcies*, 46 AM. J. COMP. L. 165, 171 (1998).

⁸ John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 OKLA. L. REV. 531, 533 (1989).

⁹ *Id.*

¹⁰ “Claim” is defined as a:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

between parties from different states and the contract would be valid under the law of one state but not the other, a choice-of-law issue can arise.

With the exception of the choice-of-law rule provided in 11 U.S.C. § 522(b)(3)(A) for determining which state's exemptions a debtor may claim to exempt property from the bankruptcy estate,¹¹ federal bankruptcy law does not provide choice-of-law rules for bankruptcy cases or guidance on how state law conflicts should be

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmaturing, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (2006).

¹¹ An individual debtor may exempt property under the:

State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place.

11 U.S.C. § 522(b)(3)(A). Congress amended the provision in 2005 to prevent forum shopping by debtors who move from one state to another prior to filing bankruptcy to take advantage of a more generous state exemption statute. In re Jevine, 387 B.R. 301, 303 (Bankr. S.D. Fla. 2008). Both the Eighth and Ninth Circuit Courts of Appeals have stated that 11 U.S.C. § 522(b)(3), formerly 11 U.S.C. § 522(b)(2), is a federal choice-of-law provision that does not incorporate the state choice-of-law rules. See In re Drenttel, 403 F.3d 611, 613–14 (8th Cir. 2005); In re Arrol, 170 F.3d 934, 936 (9th Cir. 1999) (“This is a federal choice of law in which the choice has been made. That choice is the applicable state exemption law, and in this case the exemption is California’s statutory homestead exemption. Whatever California’s conflicts of law jurisprudence may be is simply irrelevant.”).

resolved.¹² The U.S. Supreme Court has never directly addressed whether federal courts should apply state choice-of-law rules in bankruptcy cases or other federal question jurisdiction cases.¹³ *Klaxon Co. v. Stentor Electric Manufacturing Co.* requires federal courts exercising diversity jurisdiction to apply the choice-of-law rules of the state in which the court is sitting.¹⁴ However, *Klaxon* has never been extended to federal question cases.¹⁵ Thus, it remains an open question whether federal courts should apply state or federal choice-of-law rules in bankruptcy cases.

Left to grapple with the choice-of-law issue on their own without any clear direction from the Bankruptcy Code¹⁶ or the Supreme Court, the federal courts have been divided over the correct approach in bankruptcy and other federal question cases. Some courts apply the choice-of-law rules of the forum state and cite *Klaxon* as authority, while other courts reject application of *Klaxon* and apply a federal common law choice-of-law rule.¹⁷ A third group tempers its approach by considering whether there is a compelling federal interest before applying the forum state's choice-of-law rules.¹⁸

The Seventh Circuit recently had an opportunity to take a position on whether state choice-of-law rules or a federal choice-of-law approach should be applied in bankruptcy cases, but it declined to do

¹² See Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 883 (2006); Cross, *supra* note 8, at 534; *In re SMEC, Inc.*, 160 B.R. 86, 89 (M.D. Tenn. 1993).

¹³ See *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), *reh'g denied*, 329 U.S. 833 (1947); *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447 (1942), *reh'g denied*, 315 U.S. 830 (1942). The Supreme Court had an opportunity to determine whether federal courts should apply federal or state choice-of-law rules when exercising federal question jurisdiction in both cases but resolved the cases on other grounds. *Vanston*, 329 U.S. at 161–67; *D'Oench*, 315 U.S. at 455–56.

¹⁴ 313 U.S. 487, 496 (1941).

¹⁵ Gardina, *supra* note 12, at 907–09.

¹⁶ 11 U.S.C. §§ 101–1527 (2006).

¹⁷ Gardina, *supra* note 12, at 909–10.

¹⁸ *Id.* at 910.

so.¹⁹ While the outcome of *In re Jafari* would not have been altered by the application of federal choice-of-law rules, the court failed to elevate discussion of the issue. If the Seventh Circuit had applied the federal common law choice-of-law approach used by the First and Ninth Circuits in bankruptcy and other federal question cases,²⁰ the enlarged circuit split might have garnered the interest of Congress or the Supreme Court in resolving the issue.²¹

The traditional and modern choice-of-law approaches are flawed, and legal scholars have advocated the creation of a new set of choice-of-law rules.²² Application of state choice-of-law rules in bankruptcy cases results in inconsistent outcomes, which is at odds with the uniform nature of the federal bankruptcy system. The forum state's choice-of-law rules can result in the selection of substantive law of a state that has little or no relationship to the dispute between the parties.²³ In addition, the variety of choice-of-law rules, and therefore the options available for debtors or creditors seeking favorable state law, encourages forum shopping.²⁴ Furthermore, litigation of choice-of-law issues depletes the bankruptcy estate's assets. Thus, all

¹⁹ *In re Jafari*, 569 F.3d 644, 649 (7th Cir. 2009), *cert. denied*, 130 S.Ct. 1077 (2010).

²⁰ *In re Vortex Fishing Sys.*, 277 F.3d 1057 (9th Cir. 2002) (bankruptcy case); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18 (1st Cir. 2000) (Railway Labor Act); *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995) (bankruptcy case); *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992) (Foreign Sovereign Immunities Act); *Edelman v. Chase Manhattan Bank*, 861 F.2d 1291 (1st Cir. 1988) (Edge Act).

²¹ See discussion of the circuit split *infra* Part II.B.

²² SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* ¶ 370. (2006) [hereinafter SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION*]; Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 415–16 (2000).

²³ See *infra* Part III.A.1.

²⁴ See *infra* Part III.A.2. An involuntary bankruptcy case may be filed by creditors to force a debtor into Chapter 7 or Chapter 11 bankruptcy pursuant to the requirements found in 11 U.S.C. § 303 of the Bankruptcy Code; thus, creditors also have the ability to forum shop.

creditors vying for a share of the assets are impacted by a choice-of-law dispute.

Given the Supreme Court's reluctance to address the issue and the limits that the Court has imposed for creation of federal common law,²⁵ Congress should enact choice-of-law rules for bankruptcy proceedings, which it has the power to do under the Bankruptcy Clause and the Necessary and Proper Clause, or alternatively, under the Full Faith and Credit Clause.²⁶ As the Supreme Court has stated, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts."²⁷ This Note explores the current choice-of-law methodologies used by the courts and the impact of choice-of-law rules in the bankruptcy context, and argues that Congress should enact federal choice-of-law rules for bankruptcy cases.

I. BACKGROUND

A. *Bankruptcy Law Generally*

Bankruptcy law brings order to the financial chaos caused when a debtor becomes insolvent. While bankruptcy law has multiple goals, its primary purposes are to provide the debtor with a fresh start²⁸ and

²⁵ *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997) (quoting *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994) ("The [Supreme] Court has said that 'cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'")

²⁶ See U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. IV, § 1.

²⁷ *Atherton*, 519 U.S. at 218 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

²⁸ See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (providing a fresh start "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for

to ensure equitable distribution of the bankruptcy estate.²⁹ Congress is authorized to enact bankruptcy laws pursuant to Article I, Section 8, Clause 4 of the U.S. Constitution, which provides that Congress has the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”³⁰ Most states had insolvency or bankruptcy laws in place before the Constitution was enacted;³¹ however, the Founders were aware of the difficulties that courts would encounter in bankruptcy cases where the parties were from different states. In *The Federalist* No. 42, James Madison explained the need for providing Congress with the power to establish federal bankruptcy law:

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.³²

The Bankruptcy Reform Act of 1978³³ (the Bankruptcy Code), as amended by the Bankruptcy Abuse Prevention and Consumer

future effort, unhampered by the pressure and discouragement of preexisting debt”) (emphasis in original).

²⁹ See *Katchen v. Landy*, 382 U.S. 323, 328–329 (1966) (“[A] chief purpose of the bankruptcy laws is ‘to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period[.]’”) (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845); *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930) (“The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt’s estate among creditors holding just demands based upon adequate consideration.”)).

³⁰ U.S. CONST. art. I, § 8, cl. 4.

³¹ COLLIER ON BANKRUPTCY ¶ 20.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

³² THE FEDERALIST NO. 42, at 277–78 (James Madison) (The Modern Library ed., n.d.).

³³ Pub. L. No. 96-598, 92 Stat. 2549 (1978).

Protection Act of 2005³⁴ (BAPCPA), is the current bankruptcy law. Although the Bankruptcy Code is federal law,³⁵ it prioritizes, enforces, and either affirms or denies a number of rights, responsibilities, and remedies created by state law and sometimes by nonbankruptcy federal law.³⁶ For example, because “[p]roperty interests are created and defined by state law,” state law must be used to resolve questions involving property rights in the bankruptcy estate’s assets “[u]nless some federal interest requires a different result.”³⁷

For an individual debtor, bankruptcy provides a fresh start by allowing the discharge of debts under Chapter 7 or by allowing the debtor to come up with a Chapter 13 plan to restructure and pay off his or her debts and discharge certain debts after successfully completing his or her plan.³⁸ Businesses, with a few exceptions, can also either liquidate under Chapter 7³⁹ or take advantage of the reorganization provisions under Chapter 11 of the Bankruptcy Code to restructure their secured and unsecured debts, as well as their equity interests.⁴⁰ Creditors benefit under the bankruptcy process because it ensures an equitable distribution of the debtor’s assets among creditors of the same class.⁴¹

³⁴ Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

³⁵ 11 U.S.C. §§ 101–1527 (2006).

³⁶ Cross, *supra* note 8, at 535; Gardina, *supra* note 12, at 887–88.

³⁷ Butner v. United States, 440 U.S. 48, 55 (1979).

³⁸ See Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007); COLLIER ON BANKRUPTCY, *supra* note 31, ¶ 1.01[1].

³⁹ 11 U.S.C. § 109 (2006).

⁴⁰ COLLIER ON BANKRUPTCY, *supra* note 31, ¶ 1.01[1].

⁴¹ For example, the bankruptcy trustee has the power under 11 U.S.C. § 547 and 11 U.S.C. § 550 to avoid and recover for the bankruptcy estate a prebankruptcy transfer of the debtor’s property to pay or secure the obligations of a creditor. By recovering the “preference,” no creditor is preferred to the detriment of another creditor. In enacting this provision, Congress stated that “[t]he operation of the preference section to deter ‘the race of diligence’ of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section—that of

District courts exercise original jurisdiction over bankruptcy cases pursuant to 28 U.S.C. § 1334.⁴² District courts are permitted under 28 U.S.C. § 157(a) to refer their jurisdiction over bankruptcy cases to bankruptcy courts, which were created as units of the district courts by 28 U.S.C. § 151.⁴³ All judicial districts have entered orders referring all bankruptcy matters to the bankruptcy courts.⁴⁴ Under the criteria provided in 28 U.S.C. § 158, appeals from bankruptcy court orders, final judgments, and decrees can be heard by the district courts, the bankruptcy appellate panel (if one has been established by the circuit's judicial council), or directly to the federal courts of appeals (if statutory criteria are met).⁴⁵ The federal courts exercise federal question jurisdiction in bankruptcy cases.⁴⁶

B. The Development of Choice-of-Law in the U.S.

When a legal dispute between two or more parties occurs and significant aspects of a case are related to more than one jurisdiction, there must be a set of rules to determine which jurisdiction's substantive laws apply.⁴⁷ The body of law that generally tries to create solutions to these conflicts is called "conflict of laws," and courts determine which state's law to apply in a case using "choice-of-law" rules.⁴⁸ Conflicts between laws most often arise vertically (between

equality of distribution." Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95-595, at 178 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6137).

⁴² COLLIER ON BANKRUPTCY, *supra* note 31, at ¶ 3.01[1].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶ 5.02[1]–[2].

⁴⁶ 28 U.S.C. § 1331 (2006).

⁴⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

⁴⁸ See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 1.1 at 1, § 1.2 at 3 (4th ed. 2004) (The term "conflict of laws" is currently used in the United States, England, and Canada, whereas the term "private international law" is used in Continental Europe and by some English writers.)

state and federal law), horizontally (between different states' laws),⁴⁹ or between laws of a state or the United States and those of a foreign country.⁵⁰ Choice-of-law rules establish which state's substantive law, or which law within a single jurisdiction, applies in a dispute.⁵¹ Usually, the choice-of-law rule of the forum state is used to determine which state's law will be applied in a case.⁵²

The Constitution addresses both vertical and horizontal conflicts.⁵³ The Supremacy Clause provides that federal law trumps state law in conflicts between state and federal law.⁵⁴ Horizontal interstate conflicts are addressed by the Full Faith and Credit Clause, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁵⁵ Congress is also given the power to enact laws to regulate state compliance with the obligations of the Full Faith and Credit Clause, but it has rarely used this power.⁵⁶ As a result, the resolution of interstate conflicts has generally been left to the states.⁵⁷

A significant complication in applying choice-of-law rules is the variety of state approaches that are currently used.⁵⁸ States have the authority to enact choice-of-law legislation, but only Louisiana and

⁴⁹ Conflicts between states will be referred to as "interstate conflicts" in this article. States involved in a conflict will be referred to as the "forum state" and the "foreign state."

⁵⁰ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 4.

⁵¹ SCOLES ET AL., *supra* note 48, § 3.1 at 120.

⁵² *Id.*

⁵³ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 4.

⁵⁴ See U.S. CONST. art. VI, § 2.

⁵⁵ See U.S. CONST. art. IV, § 1.

⁵⁶ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 4.

⁵⁷ *Id.*

⁵⁸ Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 9–10 (1991).

Oregon have enacted comprehensive statutes.⁵⁹ In the absence of choice-of-law rules that are incorporated in specific statutes, most courts have adopted and interpreted choice-of-law rules and methodologies that have been developed by legal scholars.⁶⁰ A 2009 choice-of-law survey found that the fifty states, the District of Columbia, and Puerto Rico follow five different methodologies in contract cases and seven different methodologies in tort cases.⁶¹

Those methodologies include: the traditional “vested rights” approach; interest analysis; the better law approach; and the Restatement (Second) of Conflict of Laws (Second Restatement) approach.⁶² In addition, some states put their own gloss on the methodologies or use a combined modern approach, in which various aspects of different methodologies are blended.⁶³ Even categorizing states by methodologies poses difficulties for leading conflict-of-laws scholars.⁶⁴ States also often apply different methodologies in tort and contract cases.⁶⁵ While the traditional vested rights approach has been criticized for being too rigid, the modern choice-of-law approaches have been criticized for being too flexible.⁶⁶ The danger of too much rigidity is a rule that requires application of state law that has an insignificant or fortuitous connection to the dispute, while too much flexibility results in inconsistent application of the choice-of-law

⁵⁹ Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 232–33 & n.19 (2010) [hereinafter Symeonides, 2009 Survey].

⁶⁰ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶¶ 1, 5, 310–11.

⁶¹ Symeonides, 2009 Survey, *supra* note 59, at 231.

⁶² Gardina, *supra* note 12, at 899–901.

⁶³ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶¶ 59, 61, 101. The combined modern approach is described as eclecticism. *Id.* ¶ 61.

⁶⁴ *Id.* ¶ 59 (“Classifying a state into a particular methodological camp is not an exact science. Difficulties arise from a variety of sources, ranging from the lack or dearth of authoritative precedent, to precedents that are either equivocal or exceedingly eclectic.”).

⁶⁵ *Id.*

⁶⁶ *Id.* ¶¶ 368–69.

rule.⁶⁷ Choice-of-law scholars have noted that cases decided using a choice-of-law rule that is too flexible results in ad hoc decision-making, which increases litigations costs and wastes judicial resources.⁶⁸ Perhaps most importantly, too much flexibility increases the threat of judicial subjectivism, which challenges the public's faith in and the legitimacy of the legal system.⁶⁹ Most states have now abandoned the traditional approach, at least in one area of law, for one of the more flexible modern approaches,⁷⁰ and thus are subject to some of the dangers that accompany choice-of-law approaches that are too flexible.

1. The Traditional Choice-of-Law Methodology

The traditional approach to conflict of laws in the United States can be traced back to Ulrich Huber, a seventeenth-century Dutch scholar.⁷¹ Huber wrote an essay, published in 1689, using the term, "conflict of laws," for the first time.⁷² The essay included three principles which introduced the notion of "comity" and provided the foundation for Justice Joseph Story's later work.⁷³ Huber's principles are:

- (1) The laws of each state have force within its territory but not beyond;
- (2) These laws bind all those who are found within the territory, whether permanently or temporarily; and
- (3) Out of comity, foreign laws may be applied so that rights acquired under them can retain their force,

⁶⁷ Gardina, *supra* note 12, at 899–901.

⁶⁸ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 369.

⁶⁹ *Id.*

⁷⁰ Symeonides, 2009 Survey, *supra* note 59, at 231.

⁷¹ DAVID P. CURRIE ET AL., CONFLICT OF LAWS 3 (7th ed. 2006).

⁷² SCOLES ET AL., *supra* note 48, § 2.5 at 14.

⁷³ *Id.* § 2.5 at 14–15.

provided that they do not prejudice the state's powers or rights.⁷⁴

Huber's territorialist principles and the notion of comity, defined as more than "mere courtesy," but less than "a legal duty," while imprecise, began to provide a framework for determining when a forum state will choose to apply a foreign state's substantive laws.⁷⁵ The first two principles were dedicated to the idea of territoriality—that a state's laws were only effective within its territory and only bound its citizens or visitors within its borders.⁷⁶ The third principle contained the comity doctrine, which was an attempt to reconcile the forum state's sovereignty with the application of foreign law in a particular case.⁷⁷ Although Huber's principles were quoted in American cases beginning by at least the late 1800s, Justice Joseph Story's *Commentaries on the Conflict of Laws, Foreign and Domestic*, published in 1834, is credited as "the most important factor in the spread and acceptance of the comity doctrine."⁷⁸

During the latter half of the nineteenth century, comity was often invoked by the courts, but it was criticized because of the inherent difficulties in reconciling territorialist principles with the notion of comity.⁷⁹ To reconcile territoriality with comity, critics proposed the "vested rights" doctrine, which found the support of Professor Joseph Beale, who wrote the American Law Institute's Restatement (First) of Conflict of Laws (First Restatement).⁸⁰ Beale explained the doctrine of vested rights as follows: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called into

⁷⁴ *Id.* For a translation of Huber's essay, see Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919).

⁷⁵ SCOLES ET AL., *supra* note 48, § 2.5 at 14.

⁷⁶ *Id.* § 2.5 at 15.

⁷⁷ *Id.* § 2.7 at 20.

⁷⁸ *Id.* § 2.7 at 18.

⁷⁹ *Id.* § 2.7 at 20.

⁸⁰ *Id.* § 2.7 at 20–21; RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

question anywhere.”⁸¹ Justice Oliver Wendell Holmes embraced Beale’s “vested rights” theory in *Slater v. Mexican National Railroad Co.* in 1904,⁸² and the theory was incorporated into the provisions of the First Restatement.⁸³ Beale’s approach, and thus the First Restatement’s approach, is considered the traditional approach to choice-of-law, and courts universally used Beale’s vested rights theory until the 1950s, when modern approaches to choice-of-law began to gain traction.⁸⁴

Under the vested rights theory, a right vests when an event occurs in a state.⁸⁵ Different rules exist for various types of disputes, but a single contact determines which state’s choice-of-law rule applies in intrastate conflicts.⁸⁶ In a tort case, the court applies the law of the state where the injury occurred.⁸⁷ In a contract case, the court applies the law of the state where the contract was made.⁸⁸ The choice-of-law rule applied for procedural disputes is the forum state’s law, and the rule applied for real property disputes is the law of the state where the property is located.⁸⁹ The law of the selected jurisdiction is applied to all substantive issues.⁹⁰

⁸¹ *Id.* § 2.7 at 21 (quoting JOSEPH H. BEALE, 3 CASES ON THE CONFLICT OF LAWS 517 (1901)).

⁸² CURRIE ET AL., *supra* note 71, at 5 (citing *Slater v. Mexican Nat’l R.R. Co.*, 194 U.S. 120 (1904)).

⁸³ SCOLES ET AL., *supra* note 48, § 2.7 at 21.

⁸⁴ CURRIE ET AL., *supra* note 71, at 5.

⁸⁵ WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 20 (Jack Stark ed., Reference Guides to the U.S. Constitution, No. 15, 2005) (“The rules are ‘jurisdiction selecting,’ which means that they select the applicable law by first selecting a place or jurisdiction, and then applying the place’s substantive law rule.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

A number of “escape devices” are employed by courts seeking to avoid unfair outcomes that result from straightforward application of traditional choice-of-law rules.⁹¹ Escape devices are tools that allow a court to select a different law than would have been applied using one of the rigid choice-of-law rules under the traditional approach.⁹² Characterization, renvoi and the public policy exception are escape devices used by courts.⁹³ If a dispute has both contract and tort issues, and deciding the case under the contract rule results in a harsh outcome, the court can re-characterize the contract case as a tort case to allow application of another state’s law.⁹⁴ Courts can also characterize issues as procedural instead of substantive.⁹⁵ Renvoi is a legal principle that, when applied, results in a perpetual loop where the forum court adopts the foreign state’s “whole” law, its substantive law, and choice-of-law rules, which then refer the court back to the substantive law of the forum.⁹⁶ The forum court can refuse to consider the foreign state’s choice-of-law rules and “reject” the renvoi or accept the foreign state’s choice-of-law rules and “accept” the renvoi.⁹⁷ If the court accepts the renvoi and the foreign state’s choice-of-law rules refer back to the forum state’s law, there is “remission.”⁹⁸ If the foreign state’s choice-of-law rules refer to a third state’s substantive law, there is “transmission.”⁹⁹ Another escape device is the public

⁹¹ *Id.* at 21.

⁹² *Id.* (stating that “[escape devices] permit the court to manipulate among supposedly readily apparent choices in order to reach a desired result.”)

⁹³ *Id.*

⁹⁴ *Id.*; see *Levy v. Daniels’ U-Drive Auto Renting Co., Inc.* 108 Conn. 333 (1928) (characterizing an action to recover damages by a passenger in a rented car to be a contract action instead of a tort action, which allowed the passenger to recover damages from the rental company under Connecticut law).

⁹⁵ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 40.

⁹⁶ CURRIE ET AL., *supra* note 71, at 64.

⁹⁷ *Id.*

⁹⁸ *Id.* at 65.

⁹⁹ *Id.*

policy exception, which was recognized in the First Restatement.¹⁰⁰ Section 612 states that “[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.”¹⁰¹ Thus, if the court finds that the selected substantive law is repugnant to the public policy of the forum state, it can instead apply its own law.¹⁰²

The First Restatement’s choice-of-law system was criticized as being mechanical, rigid, and overly reliant on the principles of territorialism and vested rights.¹⁰³ The use of escape devices demonstrates that, in at least some cases, those criticisms were valid. The virtues that have been attributed to the traditional system—predictability, simplicity, and forum neutrality—were negated by the use of escape devices.¹⁰⁴ There was no attempt under the traditional approach to consider the purposes and policies behind the conflicting substantive laws, nor were the parties’ expectations taken into consideration.¹⁰⁵ Thus, the traditional approach resulted in application of the substantive law of a state that had a tenuous interest in the dispute, was unduly harsh, or defeated the parties’ expectations.¹⁰⁶

¹⁰⁰ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612.

¹⁰¹ *Id.*

¹⁰² *In re Guevara*, 409 B.R. 442 (Bankr. S.D. Tex. 2009) (holding that a Texas debtor’s \$20,000 gambling debt owed to a Louisiana casino under a gambling “marker” was not an enforceable bankruptcy claim because gambling on credit was contrary to Texas public policy).

¹⁰³ SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 22, ¶ 9.

¹⁰⁴ REYNOLDS & RICHMAN, *supra* note 85, at 21.

¹⁰⁵ SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 22, ¶ 9. (“[The traditional rules] completely sacrificed flexibility on the altar of certainty and, in the pursuit of an ill-conceived theoretical purity, they ignored the lessons of experience. They chose not among laws, but among states, based solely on a single, predesignated, territorial, or other factual contact. Subject only to limited post-choice exceptions, the chosen law applied almost automatically, regardless of its content, its underlying policy, or the substantive quality of the solution it would bring to the case at hand.”)

¹⁰⁶ REYNOLDS & RICHMAN, *supra* note 85, at 20.

Modern choice-of-law methodologies were developed in part to achieve sensible results without the need to resort to escape devices.¹⁰⁷

2. Modern Choice-of-Law Methodologies

The development of the modern approaches has been called a “revolution” because the “intellectual movement . . . challenged and eventually demolished the foundations of the established American system of conflicts law.”¹⁰⁸ Professor Brainerd Currie pioneered a comprehensive alternative approach to the vested rights theory in the 1950s and 1960s.¹⁰⁹ Currie’s approach is known as “interest analysis.”¹¹⁰ Under Currie’s methodology, generally the law of the forum state should be applied.¹¹¹ However, if the parties argued for application of a foreign state’s law:

[T]he court should first of all determine the governmental policy . . . that is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar . . . is such as to bring the case within the scope of the state’s governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.¹¹²

The court should then engage in the same analysis of the foreign state’s law and governmental policy and determine whether the

¹⁰⁷ SCOLES ET AL., *supra* note 48, § 17.8 at 723–24.

¹⁰⁸ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 1.

¹⁰⁹ *Id.* ¶ 14.

¹¹⁰ REYNOLDS & RICHMAN, *supra* note 85, at 22–23.

¹¹¹ BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 188 (1963).

¹¹² *Id.* at 189.

foreign state has an interest in application of its law.¹¹³ Through this analysis of governmental interests, the court determines which state's law should be applied.¹¹⁴

There are three generally recognized categories of conflicts that result from interest analysis: a "true conflict," where more than one state is interested in applying its law; a "false conflict," where only one state is interested; or an "unprovided-for case," where no state is interested.¹¹⁵ If a true conflict arose in an interested forum, Currie argued the law of the forum should be applied; however, in a disinterested forum, Currie advocated the dismissal of the case on *forum non conveniens* grounds or application of the forum's law, if dismissal was impossible.¹¹⁶ If the conflict was false, Currie argued the law of the only interested state, usually the forum state, should be applied.¹¹⁷ Finally, under Currie's approach for unprovided-for cases, the law of the forum is applied.¹¹⁸

The main criticism and difficulty that plagues interest analysis is identifying the purpose behind a state's law.¹¹⁹ Often, there are multiple and complex purposes and policies underlying a substantive law, and for practical reasons, a court's analysis may stop after identifying only one purpose. Furthermore, Currie's analysis most often results in application of the forum's law, and thus, interest analysis is criticized as favoring the application of forum law.¹²⁰ Thus, applying the forum state's law to resolve true conflicts encourages forum shopping.¹²¹

¹¹³ *Id.*

¹¹⁴ *Id.* at 188–89.

¹¹⁵ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 19.

¹¹⁶ *Id.* ¶ 21 & n.60.

¹¹⁷ *Id.* ¶ 20.

¹¹⁸ *Id.* ¶ 22.

¹¹⁹ *Id.* ¶ 22.

¹²⁰ *Id.* ¶ 23.

¹²¹ CURRIE ET AL., *supra* note 71, at 181.

Some courts use a “moderate and restrained” approach or the principle of “comparative impairment” to address the forum-favoring approach of interest analysis in true conflicts. Using the moderate and restrained approach, a court dissolves a true conflict by finding a false conflict, so that only one state is interested in having its law applied.¹²² The court finds a false conflict by narrowly reading the law to find its purposes and finds those purposes inapplicable to the case.¹²³ The “comparative impairment” approach, proposed by Professor William F. Baxter, considers the interests of the forum state and foreign state in having their law applied and determines which state’s policies would be impaired more if subordinated.¹²⁴ The law of the state whose interests would be most impaired is then applied.¹²⁵

In the 1960s, Professor Robert A. Leflar weighed in on the choice-of-law revolution and outlined five considerations for courts to use in deciding conflicts cases.¹²⁶ Those choice-influencing considerations are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interests; and (5) application of the “better rule of law.”¹²⁷ Leflar stated that no priority among the considerations should be inferred from the chronological order of the list.¹²⁸ However, he also stated that the better rule of law would be “more important in some types of cases than in others,

¹²² *Id.* at 185.

¹²³ Judge Traynor used the moderate and restrained approach in *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961), to find a false conflict, and he subordinated California’s interests because of the parties’ expectations that Nevada law would apply to an oral contract. Thus, the court determined that only Nevada had an interest in having its law applied.

¹²⁴ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶¶ 25–26.

¹²⁵ *Id.* ¶ 25.

¹²⁶ CURRIE ET AL., *supra* note 71, at 228–31.

¹²⁷ ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 95 at 279 (4th ed. 1986).

¹²⁸ *Id.* at § 95 at 278

almost controlling in some but irrelevant in others.”¹²⁹ Leflar’s better law approach has been criticized for “becoming a euphemism for a [forum law] approach[] and . . . providing convenient cover for judicial subjectivism.”¹³⁰ While commentators have suggested that application of the forum law usually results from the better law approach, two empirical studies, limited to tort cases, have found that the better law approach leads to application of the forum’s law no more often than the other modern approaches.¹³¹

The Second Restatement approach was developed in the wake of the various methodologies that had been created because of the deficiencies that courts had found using the vested rights approach adopted in the First Restatement.¹³² The foundation of the Second Restatement approach is provided by the factors for choosing the applicable rule of law articulated in Section 6.¹³³ Section 6 states that a court should follow its own state’s choice-of-law statute and, in the absence of a statute, consider the following factors: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied.¹³⁴ Section 6 is incorporated by reference into the provisions that deal with specific issues such as contract and tort cases, and the general overriding principle is that the law of the state with the “most significant relationship” to the dispute and the parties, as determined under the factors listed in Section 6, should be

¹²⁹ *Id.* at § 107 at 300.

¹³⁰ SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 29.

¹³¹ CURRIE ET AL., *supra* note 71, at 240, 241 n.4.

¹³² SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22, ¶ 32.

¹³³ RESTATEMENT (SECOND) CONFLICT OF LAWS § 6.

¹³⁴ *Id.*

applied.¹³⁵ In addition, the Second Restatement includes provisions that deal with specific issues and instructs courts on the type of contacts that are determinative in resolving state law conflicts. For example, Section 188 states that courts determining the rights and duties of parties under a contract without an effective choice-of-law provision should take into account the following contacts: the place of contracting; the place of negotiation; the place of performance; the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation and place of business of the parties.¹³⁶

Despite the fact that the Second Restatement has been adopted by many courts, it has been criticized for providing a “laundry list” of factors for the courts to consider that results in flexible, open-ended analysis.¹³⁷ Critics have also noted that courts following the Second Restatement simply come to their own conclusions on choice-of-law questions.¹³⁸ The Second Restatement allows courts this flexibility with its “tentative near rules, nonrules that use[] a soft ‘most significant relationship’ connecting factor, as well as state ‘interests’ and ‘policies.’”¹³⁹ The practical upshot is that the Second Restatement is viewed as a “mishmash” of the various choice-of-law methodologies, which allows judges not to be “bound by any hard and fast rules, which inevitably prompt[s] undesirable outcomes in interstate and international cases.”¹⁴⁰

¹³⁵ *Id.* §§ 145, 188.

¹³⁶ *Id.* § 188.

¹³⁷ CURRIE ET AL., *supra* note 71, at 206, 228.

¹³⁸ Juenger, *supra* note 22, at 405–06 (“In a way, [the Second Restatement] was a non-Restatement: by mixing together all manner of doctrinal currents, it simply furnished the courts with any number of plausible reasons to support whatever results they wished to reach. That, no doubt, is the principal reason why judges like it and academics detest it.”).

¹³⁹ CURRIE ET AL., *supra* note 71, at 226–27; Juenger, *supra* note 22, at 405.

¹⁴⁰ Juenger, *supra* note 22, at 405.

II. APPLICATION OF CHOICE-OF-LAW RULES IN THE FEDERAL COURTS

A. Origins of the Current Circuit Split

In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,¹⁴¹ the Supreme Court extended the holding of *Erie Railroad Co. v. Tompkins*¹⁴² to choice-of-law rules. The *Klaxon* Court held that federal courts exercising jurisdiction by virtue of diversity of citizenship must apply the choice-of-law rules of the state in which the federal court is located.¹⁴³ However, the Supreme Court has never expressly extended the holding of *Klaxon* to federal question cases. Further muddying the waters is the Supreme Court's dicta in *Vanston Bondholders Protective Committee v. Green*, which seems to suggest that a federal choice-of-law rule may make the most sense in bankruptcy cases, where there are often significant contacts in many states.¹⁴⁴ As a result, there is a split among the U.S. Courts of Appeals and confusion in the district and bankruptcy courts as to whether state or federal choice-of-law rules apply.¹⁴⁵

¹⁴¹ 313 U.S. 487, 496 (1941) (stating that “[o]therwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side”).

¹⁴² 304 U.S. 64, 77–79 (1938). In *Erie*, the Supreme Court held that a federal court exercising diversity jurisdiction must apply state common law and declared that “[t]here is no federal general common law.” *Id.* at 78. In doing so, the Court overruled *Swift v. Tyson*, under which federal courts sitting in diversity had been able to ignore the declarations of the state’s highest court and instead use their own judgment to determine what a state’s common law was. 41 U.S. 1 (1842).

¹⁴³ 313 U.S. at 496.

¹⁴⁴ 329 U.S. 156, 161–62 (1946), *reh’g denied*, 329 U.S. 833 (1947).

¹⁴⁵ Compare *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 358 (3d Cir. 2007) (concluding state choice-of-law rules apply in bankruptcy cases), *In re Gaston & Snow*, 243 F.3d 599 (2d Cir. 2001) (holding that bankruptcy courts should apply the choice-of-law rules of the forum state in the absence of a significant federal interest), *In re Payless Cashways*, 203 F.3d 1081 (8th Cir. 2000) (stating that the bankruptcy court applies the forum state’s choice-of-law rules), and *In re Merritt Dredging Co., Inc.*, 839 F.2d 203 (4th Cir. 1988) (stating that in the absence of a compelling federal interest, the court should apply the forum state’s choice-of-law rule to determine a debtor’s property interest in the property of the estate), *with In re*

A few years after *Klaxon*, in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, the Supreme Court declined to determine whether *Klaxon* applies when jurisdiction is based on a federal question.¹⁴⁶ In Justice Jackson's concurrence in *D'Oench*, he noted that *Erie* had not been extended to federal question cases and also stated that he "[did] not understand Justice Brandeis's statement in *Erie* . . . that '[t]here is no federal general common law,' to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions."¹⁴⁷ Shortly thereafter, the Supreme Court declined to decide whether *Klaxon* applied to federal question cases in *Vanston*, a bankruptcy case.¹⁴⁸ However, the Supreme Court decided not to apply state law to uphold an interest on interest bankruptcy claim on the basis of "the equitable principles governing bankruptcy distributions."¹⁴⁹ In addition, the Court stated that:

[O]bligations, such as the one here for interest, often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the

Vortex Fishing Sys., Inc., 277 F.3d 1057 (9th Cir. 2002) (stating that federal choice-of-law rules must be applied in bankruptcy cases), *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995) (stating that federal choice-of-law rules should be applied in bankruptcy cases), *In re SMEC, Inc.*, 160 B.R. 86 (M.D. Tenn. 1993) (applying an independent, federal choice-of-law rule in a legal malpractice action filed by the Chapter 7 trustee on behalf of the bankruptcy estate), and *In re Cyrus II P'ship*, 413 B.R. 609 (Bankr. S.D. Tex. 2008) (concluding that federal choice-of-law rules should apply to fraudulent conveyance claims in bankruptcy).

¹⁴⁶ 315 U.S. 447, 456 (1942), *reh'g denied*, 315 U.S. 830 (1942).

¹⁴⁷ *Id.* at 467, 469–70 (Jackson, J., concurring).

¹⁴⁸ 329 U.S. at 162–63.

¹⁴⁹ *Id.* at 163.

interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.¹⁵⁰

This dicta has intrigued the courts and has been interpreted to indicate support for a federal common law choice-of-law rule in bankruptcy cases.¹⁵¹

B. The Circuit Split

The Supreme Court has remained silent on the issue of whether state conflict-of-law rules should apply in federal question cases since *Vanston* was decided, and as a result, the federal courts have splintered into three groups. The First and Ninth Circuits, a bankruptcy court within the Fifth Circuit, and a district court within the Sixth Circuit have concluded that federal common law choice-of-law rules apply in federal question cases.¹⁵² Courts applying a federal common law choice-of-law rule for bankruptcy cases use the Second Restatement's approach.¹⁵³ The Third, Eighth, and D.C. Circuits have determined that state choice-of-law rules apply.¹⁵⁴ The Second and Fourth Circuits

¹⁵⁰ *Id.* at 161-62.

¹⁵¹ *In re SMEC, Inc.*, 160 B.R. 86, 90 (M.D. Tenn. 1993) (stating that “several courts have taken these statements as strong evidence of how the [Supreme] Court would rule on the conflicts question if unavoidably confronted with it.”)

¹⁵² *In re Vortex Fishing Sys.*, 277 F.3d 1057, 1069 (9th Cir. 2002) (bankruptcy case); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 25–26 (1st Cir. 2000) (Railway Labor Act); *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) (bankruptcy case); *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (Foreign Sovereign Immunities Act); *Edelman v. Chase Manhattan Bank*, 861 F.2d 1291, 1294 (1st Cir. 1988) (Edge Act); *In re Cyrus II P'ship*, 413 B.R. 609, 613–14 (Bankr. S.D. Tex. 2008) (bankruptcy case); *In re SMEC, Inc.*, 160 B.R. 86, 89–91 (M.D. Tenn. 1993) (bankruptcy case).

¹⁵³ *Gardina*, *supra* note 12, at 910.

¹⁵⁴ *See In re Teleglobe Commc'n*, 493 F.3d 345, 358 (3d Cir. 2007) (bankruptcy case); *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000) (bankruptcy case); *FDIC v. Nordbrock*, 102 F.2d 335, 337 (8th Cir. 1996) (FIRREA); *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464–65

have concluded that the forum state's choice-of-law rules should apply in the absence of a compelling federal interest.¹⁵⁵ However, some of the federal courts cannot be clearly placed in one group. The Fifth Circuit has declined to decide the issue twice¹⁵⁶ but has stated that "[w]hen disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice-of-law rules, but are free to apply the law considered relevant to the pending controversy."¹⁵⁷ The Seventh Circuit, on the other hand, has taken inconsistent positions in federal question cases. The confusion has led one bankruptcy court to decline to adopt a particular approach and instead analyze the choice-of-law question under all three approaches.¹⁵⁸

C. The Seventh Circuit's Approach in Bankruptcy and Other Federal Question Cases

The Seventh Circuit has applied state choice-of-law rules in bankruptcy cases.¹⁵⁹ In *In re Iowa Railroad Co.*, the Seventh Circuit

(D.C. Cir. 1995) (Edge Act); *Carlson v. Tandy Computer Leasing*, 803 F.2d 391, 393 (8th Cir. 1986) (bankruptcy).

¹⁵⁵ See *In re Gaston & Snow*, 243 F.3d 599, 606–07 (bankruptcy); *In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 206 (bankruptcy); *but see* *Detroit Edison Co. v. Pac. Ins. Co.*, 742 F. Supp. 287, 289 (M.D.N.C. 1990) (concluding that a federal common law choice-of-law rule should be applied in a federal question case under the Comprehensive Environmental Response, Compensation, and Liability Act), *aff'd*, 944 F.2d 901 (4th Cir. 1991).

¹⁵⁶ *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 748–49 (5th Cir. 1981) (bankruptcy); *Fahs v. Martin*, 224 F.2d 387, 396 (5th Cir. 1955).

¹⁵⁷ *In re Crist*, 632 F.2d 1226, 1229 (5th Cir. 1980) (bankruptcy case).

¹⁵⁸ *In re Friedlander Capital Mgmt. Corp.*, 411 B.R. 434, 441–43 (Bankr. S.D. Fla. 2009) ("Because the result is the same under the three approaches discussed below, the Court declines to adopt a particular approach in this case.").

¹⁵⁹ See *In re Jafari*, 569 F.3d 644, 649 (7th Cir. 2009), *cert. denied*, 130 S.Ct. 1077 (2010) (concluding that the court need not answer the choice-of-law question because the application of the federal common law approach produced the same result as the application of Wisconsin choice-of-law principles); *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000) (applying a state choice-of-law rule but noting the

simply followed the holding of *Klaxon* and applied Illinois choice-of-law rules because the court sits in Chicago, Illinois.¹⁶⁰ The court acknowledged the circuit split in *In re Morris* but applied Illinois choice-of-law rules, which dictated the use of Iowa substantive law.¹⁶¹ In *Fogel v. Zell*, the court noted the split and then applied Illinois choice-of-law rules.¹⁶² However, in other federal question cases, the court has applied federal choice-of-law principles.¹⁶³

In *Resolution Trust Corp. v. Chapman*, the Resolution Trust Corporation brought a negligence action against the former directors and officers of a federally chartered savings and loan under a federal law, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).¹⁶⁴ The court explicitly stated that the choice-of-law question was a federal one in *Chapman*, a non-diversity case.¹⁶⁵ Although *Atherton v. Federal Deposit Insurance Corp.* later overruled the primary holding of *Chapman*, the Seventh Circuit has stated that “[t]he ruling on choice-of-law, however, presumably

persistent circuit split); *In re Morris*, 30 F.3d 1578, 1582 (7th Cir. 1994) (recognizing the circuit split but declining to resolve it because both the forum state’s choice-of-law rules and the federal common law choice-of-law rule came to the same conclusion); *In re Iowa R.R. Co.*, 840 F.2d 535, 543 (7th Cir. 1988) (applying a state choice-of-law rule in a bankruptcy case and stating that “federal courts refer to the ‘whole law’ of the forum state”).

¹⁶⁰ 840 F.2d at 542–43.

¹⁶¹ 30 F.3d at 1582. *In re Morris* illustrates how characterization can determine the outcome of a case. The bankruptcy trustee argued that the issue was the validity or effect of conveyance of real estate; however, the Seventh Circuit agreed with the bankruptcy and district courts that the relevant issue was the corporation’s existence and legal capacity. *Id.* If the Illinois choice-of-law rule for resolving questions about the validity or effect of a conveyance had been applied, Illinois substantive law would have been selected since the land in question was located in Illinois. *Id.*

¹⁶² 221 F.3d at 966.

¹⁶³ *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120 (7th Cir. 1994), *reh’g en banc denied* (7th Cir. 1994), *overruled by* *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213 (1997); *Berger v. AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006).

¹⁶⁴ 29 F.3d at 1124.

¹⁶⁵ *Id.*

remains controlling precedent.”¹⁶⁶ Most recently in 2006, the court applied a federal choice-of-law rule in *Berger v. AXA Network LLC*, a case where the underlying claim was based on the Employee Retirement Income Security Act (ERISA).¹⁶⁷ The parties in *Berger* disagreed as to whether Illinois or New York law supplied the applicable statute of limitations period for the action where one was not provided in the applicable ERISA provision.¹⁶⁸ In discussing the choice-of-law issue, the court stated “[w]hat law Illinois courts would choose is . . . irrelevant. This is not a diversity case, where *Erie* would require the forum court to apply the whole law of the state, including its choice of law principles.”¹⁶⁹ Additionally, the court stated that:

In fashioning a choice of law rule to govern our quest for the most appropriate state limitations period, our task, when the underlying claim is a *federal* claim, is to fashion a *federal* choice of law rule. This principle is really nothing more than a corollary principle to the more general maxim that, when state law is borrowed in a *federal* question suit, the choice of ‘which [state] law to select is itself a question of *federal* law.’¹⁷⁰

¹⁶⁶ Fed. Deposit Ins. Corp. v. Wabick, 335 F.3d 620, 625 n.2 (7th Cir. 2003). In *Wabick*, a case brought by the Federal Deposit Insurance Corporation (FDIC) under FIRREA, the court was faced with the question of whether the federal statute or Illinois’ substantive law provided the applicable statute of limitations. *Id.* at 622, 626. The district court, using federal common law choice-of-law rules, determined that Washington, D.C.’s statute of limitations applied. *Id.* at 624. The Seventh Circuit reversed because it found that the question was resolved by the statute itself, which directed the court to apply the forum state’s choice-of-law principles. *Id.* at 627–28. The Court recognized that by applying state choice-of-law rules in *Wabick*, it was taking a different position than the one it had taken in *Resolution Trust Corp.* *Id.* at 625.

¹⁶⁷ 459 F.3d at 805, 809–10.

¹⁶⁸ *Id.* at 809.

¹⁶⁹ *Id.* at 810.

¹⁷⁰ *Id.* at 809–10 (quoting *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120, 1124 (7th Cir. 1994)) (emphasis in original).

The court went on to reason that “the exercise of federal question jurisdiction does not implicate concerns of federalism and interstate comity.”¹⁷¹ Thus, the Seventh Circuit has stated that application of federal choice-of-law principles is appropriate in cases where the court is exercising federal question jurisdiction. It is unclear why the court’s strong endorsement of federal choice-of-law rules in some federal question cases has not extended to bankruptcy cases.

D. In re Jafari

The Seventh Circuit recently had an opportunity to decide whether state choice-of-law rules or a federal common law choice-of-law rule applies in bankruptcy in *In re Jafari*.¹⁷² Unfortunately, the court did little more than provide an outline of the circuit split that presently exists.¹⁷³ In *Jafari*, the Seventh Circuit affirmed the conclusion of the bankruptcy court that Wisconsin choice-of-law rules applied and that under Wisconsin’s “grouping of contacts” rule for contractual disputes, Nevada law applied to the claims of the creditors.¹⁷⁴ As a result, the creditors’ claims were allowed under Nevada law.¹⁷⁵

The debtor, Robert Jafari, was a gambling addict whose gambling debts ultimately cost him his job and led to his filing a Chapter 11 bankruptcy petition.¹⁷⁶ Despite being bailed out of roughly \$3,000,000 in gambling debts by his father before 2005, Jafari continued to gamble.¹⁷⁷ In 2005, Jafari, a Wisconsin resident, traveled to Las Vegas, Nevada, to gamble, and a credit line was approved for Jafari by

¹⁷¹ *Id.* at 810.

¹⁷² *In re Jafari*, 569 F.3d 644, 649 (7th Cir. 2009), *cert. denied*, 130 S.Ct. 1077 (2010).

¹⁷³ *Id.* at 648–49.

¹⁷⁴ *Id.* at 649–51.

¹⁷⁵ *Id.* at 651.

¹⁷⁶ *In re Jafari (Jafari III)*, 378 B.R. 575, 578–79 (Bankr. W.D. Wisc. 2007), *rev’d*, *In re Jafari (Jafari II)* 385 B.R. 262 (W.D. Wisc. 2008), *aff’d*, *In re Jafari*, 569 F.3d 644.

¹⁷⁷ *In re Jafari*, 569 F.3d at 646.

casino developer Steve Wynn for use at his casino.¹⁷⁸ Jafari made trips to Las Vegas to gamble at the Wynn and other casinos numerous times in 2005.¹⁷⁹ In September 2005, Jafari executed with the Wynn a new credit agreement, also known as a “marker,” with an initial line of credit of \$150,000, then executed subsequent credit line increase requests, bringing his total line of credit to \$1,000,000.¹⁸⁰

During September 2005, another Las Vegas casino, Caesar’s, also extended credit totaling \$250,000 to Jafari.¹⁸¹ Jafari failed to repay the credit advance, so Wynn and Caesar’s presented their markers for payment against his bank account.¹⁸² Payment was denied, so both Wynn and Caesar’s filed suit against Jafari in Nevada district court.¹⁸³ Two days before his answer was due in the Nevada case, Jafari and his wife filed a Chapter 11 bankruptcy petition in Wisconsin, which stayed the Nevada lawsuit.¹⁸⁴ Wynn and Caesar’s then filed timely proofs of claim in the bankruptcy court, to which the Jafaris and the bankruptcy trustee objected.¹⁸⁵ Wynn’s proof of claim was for over \$1.2 million, and Caesar’s was for \$250,000.¹⁸⁶ The Jafaris and the bankruptcy trustee argued that under the Wisconsin Anti-Gaming Statute, the gambling debts could not be enforced.¹⁸⁷ Thus, the bankruptcy court had to decide whether to allow or disallow the casinos’ claims.¹⁸⁸ Concluding that it was required to apply Wisconsin’s choice-of-law rules instead of federal common law choice-of-law rules, the bankruptcy court disallowed the claims because it determined that the claims for gambling debts were

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 646–47.

¹⁸⁶ *Id.* at 646.

¹⁸⁷ *Id.* at 647.

¹⁸⁸ *Id.*

unenforceable under Wisconsin's Anti-Gaming Statute, which states that gaming contracts are void.¹⁸⁹ Wynn and Caesar's appealed to the U.S. District Court for the Western District of Wisconsin, which reversed the bankruptcy court's holding and declined to decide whether Wisconsin's choice-of-law rules or the federal common law choice-of-law rules applied.¹⁹⁰ The district court determined that Nevada substantive law would apply to determine if the credit agreements were enforceable under either Wisconsin choice-of-law rules or the federal common law choice-of-law rules.¹⁹¹ Upon remand, the bankruptcy court applied Nevada law and determined that the claims were allowable.¹⁹²

On appeal, Jafari argued that the forum state's choice-of-law rules should be applied in the absence of a compelling federal policy or interest.¹⁹³ Applying Wisconsin's choice-of-law rule, Jafari argued, would result in Wisconsin substantive law applying and the casino's claims being disallowed due to Wisconsin's strong public policy interest in applying its anti-gambling statute.¹⁹⁴ The casinos argued that because of the need for uniformity in bankruptcy case administration, the bankruptcy court must apply federal common law choice-of-law rules.¹⁹⁵ Under their analysis, the casinos stated that Nevada law would apply.¹⁹⁶ In the alternative, the casinos argued that even if the bankruptcy court was required to apply Wisconsin's choice-of-law rules, Nevada law would be selected because of Jafari's numerous contacts with Nevada.¹⁹⁷

The Seventh Circuit determined that if the same outcome would result under application of either Wisconsin choice-of-law principles

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* 647–48.

¹⁹⁵ *Id.* at 648.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

or the federal common law choice-of-law approach, there was no need for the court to resolve the question as to which choice-of-law rules should be applied in bankruptcy cases.¹⁹⁸ The court then applied Wisconsin's choice-of-law rule for contracts and determined that the significant contacts in the *Jafari* case favored the selection of Nevada law.¹⁹⁹ The court further determined that a Wisconsin court would not have applied the public policy exception.²⁰⁰

III. ANALYSIS

A. Policy Concerns in Bankruptcy

The outcome of the *Jafari* case is unremarkable. Using most choice-of-law methodologies, the facts in *Jafari* would have led to the application of Nevada law. In addition, the credit agreements that Jafari had signed with the casinos contained statements that Nevada law would apply in the case of a dispute, although the Seventh Circuit did not address this fact.²⁰¹ The court was able to avoid making a difficult decision on the choice-of-law issue because Nevada law was selected by applying either Wisconsin's choice-of-law rules or the federal choice-of-law principles. Consequently, the Seventh Circuit did not meaningfully address the circuit split, why it has chosen to apply federal choice-of-law rules in other federal question cases, or the policy concerns, such as uniformity, that are unique to bankruptcy.

As the *Jafari* district court opinion noted, "a federal bankruptcy court is in an unusual position. Its jurisdiction arises not from diversity, but from federal bankruptcy law, which has a goal of national uniformity, rather than congruence with state law."²⁰² As discussed in Part I.A., Congress was empowered to enact uniform

¹⁹⁸ *Id.* at 649.

¹⁹⁹ *Id.* at 650.

²⁰⁰ *Id.* at 650–51.

²⁰¹ *Jafari II*, 385 B.R. 262, 265 (W.D. Wisc. 2008), *aff'd*, 569 F.3d 644, *cert. denied*, 130 S.Ct. 1077 (2010).

²⁰² *Id.* at 266.

bankruptcy laws under the Bankruptcy Clause, and as Madison wrote in *The Federalist* No. 42, uniform bankruptcy laws were necessary to deal with the problems that would arise in bankruptcy cases where the debtor and creditors were from different states.

Courts are faced with the “special bankruptcy problems of uniformity, ratable distribution and fairness and equity which grow out of the context of the bankruptcy law.”²⁰³ However, application of various state choice-of-law rules yields inconsistent results, which are at odds with the goal of uniformity in bankruptcy. In addition, state choice-of-law rules, which favor the forum, can result in selection of substantive law with a tenuous connection to the dispute and parties. Finally, liberal bankruptcy venue rules and favorable state law invites interstate forum shopping.

1. Substantive Law with a Tenuous Connection to the Dispute and Parties

Application of state choice-of-law rules in bankruptcy can result in selection of the substantive law of a state that has little or no connection with the dispute. *In re Gaston & Snow*, a case often cited for its discussion of the circuit split over choice-of-law rules in bankruptcy cases, is an example of a case where the law of New York, which had almost no connection to the dispute, was selected by application of New York’s choice-of-law rules.²⁰⁴ *Gaston & Snow* (G & S) was a law firm that had gone into bankruptcy.²⁰⁵ G & S’s bankruptcy estate administrator filed an adversary proceeding in New York against a client, Robert Erkins, to recover \$1.7 million for legal services that had allegedly been performed for Erkins.²⁰⁶ Erkins, an Idaho businessman, had hired G & S, a Boston, Massachusetts, firm,

²⁰³ *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 165 n.9 (1946), *reh’g denied*, 329 U.S. 833 (1947).

²⁰⁴ *In re Gaston & Snow*, 243 F.3d 599, 605–07 (2d Cir. 2001), *cert. denied*, 543 U.S. 1042 (2001).

²⁰⁵ *Id.* at 602. An involuntary chapter 11 bankruptcy petition had been filed against G & S, so the firm did not engage in forum shopping in this case.

²⁰⁶ *Id.* at 602-03.

to represent him in litigation in Idaho based on an oral agreement, the terms of which were in dispute.²⁰⁷ G & S had a satellite office in New York, but its Boston-based attorneys represented Erkins.²⁰⁸ Application of Idaho's statute of limitations period of four years would have barred the oral contract claim, whereas the claim would have been valid under application of the New York six-year statute of limitations period.²⁰⁹ The Second Circuit applied New York's choice-of-law rule for contract cases, which requires selecting the state that has the greatest interest in the case by determining which jurisdiction has the most contacts with the litigation.²¹⁰ The court acknowledged that "New York's relationship to the action is insignificant compared to Idaho's."²¹¹ None of the business transacted between Erkins and G & S occurred in New York.²¹² However, New York also had a borrowing statute, which required application of the New York statute of limitations period when "the cause of action accrued in favor of a resident of the state."²¹³ Thus, the court found that New York's statute of limitations applied.²¹⁴ The court acknowledged the defendant's argument that the cause of action did not accrue in favor of the bankruptcy administrator, a New York resident, and that G & S was not a New York resident; however, the defendants did not raise that argument below, and the court declined to consider the argument on appeal.²¹⁵ *Gaston* is a clear example of the forum-favoring nature

²⁰⁷ *Id.* at 602.

²⁰⁸ *Id.* at 602–03.

²⁰⁹ *Id.* at 604.

²¹⁰ *Id.* at 607–08.

²¹¹ *Id.* at 605.

²¹² *Id.* at 602.

²¹³ *Id.* at 604 (citing N.Y. Civil Practice Law and Rules § 202 (1993)).

²¹⁴ *Id.* at 608–09.

²¹⁵ *Id.* at 608. The court also stated that the defendant's argument was "quite dubious," and under New York law, "[a] nonresident's contract claim accrues where the nonresident resides." *Id.* at 608 n.7. Further, the court stated that G & S's residence was Massachusetts, under which a six-year statute of limitations would have been applied. *Id.* 608 n.3.

of some choice-of-law rules and how the law of a state with little connection to the dispute may nevertheless be selected.

2. Interstate Forum Shopping

Intrastate forum shopping between federal and state courts, the very evil that the Supreme Court was trying to prevent by requiring federal courts sitting in diversity to apply state choice-of-law rules,²¹⁶ is not the issue in bankruptcy cases. As the Ninth Circuit stated, “[i]n [federal question] cases, the risk of forum shopping which is avoided by applying state law has no application, because the case can only be litigated in federal court. The value of national uniformity of approach need not be subordinated, therefore, to differences in state choice of law rules.”²¹⁷ By contrast, application of state choice-of-law rules invites interstate forum shopping. In fact, overruling *Klaxon* has been advocated for several reasons, including the fact that *Klaxon* encourages interstate forum shopping under the current system in which states provide a variety of choice-of-law approaches.²¹⁸

²¹⁶ See *Ferens v. John Deere Co.*, 494 U.S. 516, 534–35 (1990) (Scalia, J., dissenting) (“The goal of *Erie* and *Klaxon* . . . was to prevent “forum shopping” as between state and federal systems”)

²¹⁷ *In re Lindsay*, 59 F.3d 942, 948 (2d Cir. 1995).

²¹⁸ See Fruehwald, *supra* note 3, at 36–39. Fruehwald argues that *Klaxon* should be overruled:

Although this article proposes *Erie* is constitutionally required and necessary for practical reasons, the same does not apply to *Klaxon*. First, *Klaxon* was a poorly-reasoned decision that is supported on a single ground—the dangers of intrastate forum shopping. Second, because of the numerous state choice of law approaches that exist today, *Klaxon* encourages interstate forum shopping for favorable law. Third, *Klaxon* ignores the fact that choice of law is a multistate process that should not be restricted by parochial state conflicts rules. Fourth, *Klaxon* often encourages, rather than discourages, intrastate forum shopping. Finally, *Klaxon* produces absurd results in some cases.

Id. at 36.

In his dissenting opinion in *Ferens v. John Deere Co.*, Justice Scalia wrote that forum shopping was invited not only by more generous statute of limitations available under various state laws, but also by the variety of state choice-of-law rules.²¹⁹ In *Ferens*, the Supreme Court held that following a transfer under 28 U.S. § 1404(a) initiated by the plaintiff, the transferee court must apply the choice-of-law rules applied in the transferor court.²²⁰ This holding allowed the plaintiff, who had failed to file suit in Pennsylvania federal court before the Pennsylvania tort statute of limitations period ran, to file a tort action in Mississippi federal court and then have the suit transferred back to Pennsylvania along with the more generous six-year statute of limitations period required under Mississippi's choice-of-law rules.²²¹ *Ferens*, although not a bankruptcy case, is an example of forum shopping at its zenith.²²² In addition, it shows that *Klaxon* encourages forum shopping by requiring federal courts to apply state choice-of-law rules.²²³

While the Bankruptcy Code does have some provisions that discourage forum shopping by limiting where a debtor may file for bankruptcy, there is some flexibility to those limitations, especially for business debtors. For example, under Chapter 11, an individual may file in the district where she or he resides.²²⁴ However, if an individual debtor wants to take advantage of a state's exemption scheme, which

²¹⁹ *Ferens*, 494 U.S. at 538 (Scalia, J., dissenting) (“[T]he file-and-transfer ploy sanctioned by the Court today will be available . . . to bring home to the desired state of litigation all sorts of favorable choice-of-law rules regarding substantive liability—in an era when the diversity among the States in choice-of-law principles has become kaleidoscopic.” *Id.* Justice Scalia's dissent was joined by Justices Brennan, Marshall, and Blackmun. *Id.* at 533.

²²⁰ *Id.* at 518–19.

²²¹ *Id.* at 519–20.

²²² *Id.* at 535–36 (“The plaintiffs were seeking to achieve exactly what *Klaxon* was designed to prevent: the use of a Pennsylvania federal court instead of a Pennsylvania state court in order to obtain application of a different substantive law. . . . The significant federal judicial policy expressed in *Erie* and *Klaxon* is reduced to a laughingstock if it can so readily be evaded through filing-and-transfer.”).

²²³ Fruehwald, *supra* note 3, at 43.

²²⁴ 28 U.S.C. § 1408 (2006).

determines the property that is exempted from the bankruptcy estate, the debtor must have been domiciled in that state for the 730 days preceding the filing of the bankruptcy petition.²²⁵ If the debtor has not lived in a single place for that period of time, then the law of the state where the debtor lived for the 180 days before filing bankruptcy supplies the state exemption option.²²⁶ Business debtors, on the other hand, have a variety of venue options. They may file in the state where the business is incorporated, in the state where its principle place of business is located, in the state where its assets are located, or in the state where its affiliate, general partner, or partnership's bankruptcy is pending.²²⁷ These options provide business debtors with considerable flexibility in choosing where to file bankruptcy, and in a significant percentage of large Chapter 11 cases, Delaware and New York are the jurisdictions most often selected.²²⁸ One example of forum shopping that occurred under the flexible options offered to corporate debtors was Winn-Dixie's bankruptcy.²²⁹ Winn-Dixie, a Florida-based grocery chain, incorporated a New York subsidiary, saddled it with debt, and then had the subsidiary file for bankruptcy twelve days later.²³⁰ This allowed the parent company to file for bankruptcy in New York

²²⁵ 11 U.S.C. § 522(b)(3)(A).

²²⁶ *Id.*

²²⁷ 28 U.S.C. § 1408.

²²⁸ See Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968 (1999); Lynn M. LoPucki, *Points of View; Commentary and Analysis, Courting the Big Bankrupts*, LEGAL TIMES, July 18, 2005, at 58. [hereinafter LoPucki, *Courting the Big Bankrupts*]. LoPucki's empirical analysis and anecdotal evidence have focused on forum shopping, the competition by courts and judges for large Chapter 11 cases, and the negative effects on the bankruptcy system. Eisenberg & LoPucki, *supra*, at 967–72. However, not all scholars agree that forum shopping is bad, and they have criticized LoPucki's analysis for failing to distinguish between good and bad forum shopping. Todd J. Zywicki, *Review Essay, Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1143 (2006).

²²⁹ LoPucki, *Courting the Big Bankrupts*, *supra* note 228, at 59.

²³⁰ *Id.*

shortly thereafter because its affiliate's bankruptcy was pending in the state.²³¹

Bankruptcy courts have recognized the opportunity for forum shopping and have applied a federal choice-of-law rule to ensure that forum shopping is not used to manipulate the claims allowance process.²³² In *In re Segre's Iron Works, Inc.*, the debtor objected to a proof of claim filed by a creditor based on alleged fraudulent representations made by the debtor about a sculpture attributed to Alexander Calder.²³³ The debtor argued that the creditor's claim was not enforceable because Connecticut's statute of limitations for tort actions had run.²³⁴ The court applied a federal common law choice-of-law rule and found that New York, where most of the relevant acts took place, had the greatest interest in the case.²³⁵ The court explained that:

It is fundamentally unfair, and subversive of uniformity, for a debtor to be permitted to defeat a creditor's claim—which was timely prosecuted in, and under the law of, the state with the greatest interest in the dispute—through the simple maneuver of filing a bankruptcy case in a different state where a less generous statute of limitation arguably controls. Allowance of claims against a bankruptcy estate should not depend upon the happenstance or devise of bankruptcy venue. To rule otherwise would encourage forum-shopping by debtors who may contemplate moving a residence, or restructuring business operations to permit a bankruptcy filing in a state with

²³¹ *Id.*

²³² *In re Segre's Iron Works, Inc.*, 258 B.R. 547, 551–52 (Bankr. D. Conn. 2001).

²³³ *Id.* at 549–50.

²³⁴ *Id.* at 550–51.

²³⁵ *Id.* at 551.

an expired limitations period as to material claims against them.²³⁶

Thus, an opportunity for forum shopping exists, and debtors may engage in forum shopping to take advantage of courts²³⁷ or state substantive law, such as a statute of limitations, that is considered desirable.²³⁸ The ability to forum shop under Chapter 11's venue provision has been recognized, and efforts at reform have been supported by bankruptcy experts, members of Congress, the National Bankruptcy Review Commission, state attorneys general, and consumer, employee, and small business interest groups.²³⁹ However, Congressional efforts to amend the provision have been unsuccessful.²⁴⁰ Creating federal choice-of-law rules that do not favor

²³⁶ *Id.* at 552.

²³⁷ LoPucki, *Courting the Big Bankrupts*, *supra* note 228, at 58.

²³⁸ *In re Segre's Iron Works, Inc.*, 258 B.R. 547, 550–51.

²³⁹ John Cornyn, Points of View; Commentary and Analysis, *They Owe Us: Companies Seeking Bankruptcy Relief Should Face Creditors in Their Home Court*, LEGAL TIMES, June 6, 2005, at 67.

²⁴⁰ In response to corporate Chapter 11 forum shopping, Texas Senator John Cornyn introduced a bill, the Fairness in Bankruptcy Litigation Act of 2005, to amend 28 U.S.C. § 1408, the Bankruptcy Code's venue provision for Chapter 11 cases in 2005. Cornyn, *supra* note 239. Senator Cornyn cited the filing of Houston-based Enron's bankruptcy claim in New York in 2001 as an example of corporate bankruptcy forum shopping. *Id.* As Attorney General of Texas, Cornyn had argued that Enron should have faced its creditors and filed for bankruptcy in Texas. *Id.* The bill would have amended the venue provision to limit the jurisdictions available to corporate debtors that were filing bankruptcy. *Id.* The proposed reforms were based on a major recommendation of the National Bankruptcy Review Commission, and the legislation was supported by leading bankruptcy experts, a bipartisan coalition of twenty-four state attorneys general, as well as groups representing consumer, employee, and small business interests. *Id.* Senator Cornyn attempted to attach his bill as an amendment to BAPCPA, the bankruptcy overhaul bill that was enacted in 2005. Gebe Martinez, *Bankruptcy Bill Losing Enron Link: Cornyn Taking Out Measure on 'Judge Shopping'*, HOUSTON CHRONICLE, March 3, 2005, <http://www.chron.com/dispatch/story.mpl/special/05/legislature/3065576.html>. However, faced with the strong opposition of then-Senator and now-Vice President Joseph Biden, and his fellow Delaware Senator Thomas Carper, who were concerned about potential revenue losses to their state, Senator Cornyn was forced to drop the

a particular forum could prevent forum shopping and would likely be less controversial than trying to amend the Chapter 11 venue provisions, under which some states have benefitted.²⁴¹

B. Relevant Constitutional Provisions

Five constitutional provisions have been identified that have varying levels of relevance in conflict of laws and provide constitutional limits on state authority or require cooperation by the states.²⁴² Those provisions include: the Full Faith and Credit Clause; the Due Process Clause; the Equal Protection Clause; the Commerce Clause; and the Privileges and Immunities Clause.²⁴³ In choice-of-law cases, the Supreme Court has discussed both the Due Process and Full Faith and Credit Clauses.²⁴⁴ In the context of bankruptcy and choice-of-law, three clauses—the Bankruptcy Clause, the Necessary and Proper Clause, and the Full Faith and Credit Clause—are all relevant to the discussion of Congress' power to enact choice-of-law rules.²⁴⁵

amendment. *Id.* The Fairness in Bankruptcy Litigation Act of 2005 was never voted out of the Senate Committee on the Judiciary. S. 314, 109th Cong. (1st Sess. 2005).

²⁴¹ See *supra* note 240.

²⁴² LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS § 3.1, at 112, 128 (1991).

²⁴³ U.S. CONST. art. IV, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. IV, § 2, cl. 1; BRILMAYER, *supra* note 240, § 3.1, at 112.

²⁴⁴ See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (due process); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932) (full faith and credit); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (due process); *Alaska Packers Assoc. v. Indus. Accident Comm'n*, 294 U.S. 532 (1935) (full faith and credit); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939) (full faith and credit); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (due process and full faith and credit); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (due process and full faith and credit); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (due process and full faith and credit); *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003) (full faith and credit).

²⁴⁵ See U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. III, § 1.

The Bankruptcy Clause empowers Congress to enact bankruptcy laws,²⁴⁶ and the Necessary and Proper Clause grants Congress the power to enact laws to execute its enumerated powers,²⁴⁷ which include the Bankruptcy Clause. Furthermore, Congress has the ability to establish lower federal courts under Articles I and III of the Constitution.²⁴⁸ It follows that Congress has the power to create bankruptcy courts, the bankruptcy laws, and the rules of procedures used by the courts.²⁴⁹ Thus, Congress has the power to enact federal choice-of-law rules as part of its ability to establish the bankruptcy court's rules pursuant to its power under the Bankruptcy Clause and Necessary and Proper Clause.²⁵⁰

Another legislative avenue for Congress, and the more direct grant of power vis-à-vis choice-of-law, is the Full Faith and Credit Clause.²⁵¹ Congress has the power to legislate choice-of-law rules under the Full Faith and Credit Clause, which provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”²⁵² How to apply the Full Faith and Credit Clause to each state's public acts is the portion of the clause relevant to choice-of-law issues.

The debate on the Full Faith and Credit Clause at the Constitutional Convention of 1787 was limited, but the comments of those moving for action on the clause provide some insight into its purpose.²⁵³ On the day that the most extensive debate on the Full Faith and Credit Clause took place, the Bankruptcy Clause was also discussed, and bankruptcy was discussed as part of the need for the

²⁴⁶ U.S. CONST. art. I, § 8, cl. 4.

²⁴⁷ U.S. CONST. art. I, § 8, cl. 18.

²⁴⁸ U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

²⁴⁹ See Cross, *supra* note 8, at 561; Gardina, *supra* note 12, at 925.

²⁵⁰ *Id.*

²⁵¹ See U.S. CONST. art. IV, § 1.

²⁵² See *id.*

²⁵³ Jackson, *supra* note 1, at 4.

Full Faith and Credit Clause.²⁵⁴ The records from August 29, 1787, note that, “Mr. Wilson & Docr. Johnson supposed the meaning to be that Judgments in one State should be ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency &c.”²⁵⁵ It is interesting that members of the Constitutional Convention believed that there was a connection between bankruptcy and the Full Faith and Credit Clause.²⁵⁶ Although the clause was discussed later in the Constitutional Convention, the final form of the Full Faith and Credit Clause is substantially similar to the version of the clause that resulted from the debates on that day.²⁵⁷

Most importantly, the second sentence of the Full Faith and Credit Clause grants Congress the power to enact laws that determine how full faith and credit shall be given to each state’s public acts, records and judicial proceedings.²⁵⁸ However, the early Congresses used their power under the Full Faith and Credit Clause very sparingly,²⁵⁹ and the more modern Congresses have also been reluctant to use their power.²⁶⁰ As a result, the courts have been left to determine how to apply the Full Faith and Credit Clause.²⁶¹

²⁵⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 447 (Max Farrand ed. 1911). The next comment that was recorded, in the middle of the discussion surrounding the Full Faith and Credit Clause, was a motion to commit to the Bankruptcy Clause. *Id.* The comments then returned to the Full Faith and Credit Clause. *Id.* at 447–48. As originally proposed, the Full Faith and Credit Clause provided no power to Congress. Jackson, *supra* note 1, at 4–5. The debate reflects that James Madison wanted Congress to have the power “to provide for the *execution* of Judgments in other States”; however this drew opposition from Mr. Randolph. RECORDS OF THE FEDERAL CONVENTION, *supra*, at 448. Gouverneur Morris then moved to commit to the Full Faith and Credit Clause, and his motion was adopted: “[T]he Legislature shall by general laws, determine the proof and effect of such acts, records and proceedings.” *Id.*

²⁵⁵ *Id.* at 447.

²⁵⁶ *See id.*

²⁵⁷ Jackson, *supra* note 1, at 5.

²⁵⁸ U.S. CONST. art. IV, § 1.

²⁵⁹ Jackson, *supra* note 1, at 5–6.

²⁶⁰ *See* SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION, *supra* note 22 ¶ 4 n. 11 (citing two statutes that Congress has passed, 28 U.S.C. § 1738A,

C. Institutional Considerations

Institutional considerations are significant in determining whether the Supreme Court or Congress should create choice-of-law rules. The Supreme Court has almost completely withdrawn from the discussion over choice-of-law and the Full Faith and Credit Clause,²⁶² and its recent dicta has provided little guidance to the bar or the lower courts. In *Franchise Tax Board of California v. Hyatt*, the Court stated that:

[O]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments . . . Whereas the full faith and credit command is exacting with respect to [a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, . . . it is less demanding with respect to choice of laws.²⁶³

In its earlier Full Faith and Credit jurisprudence, the Court had attempted to apply a balancing approach to resolving conflicts between state laws.²⁶⁴ However, the Court found the balancing approach unsatisfactory and subsequently abandoned that approach for resolving conflicts of law.²⁶⁵

the Federal Parental Kidnapping Prevention Act, and 28 U.S.C. § 1738C, the “Defense of Marriage Act.”)

²⁶¹ Jackson, *supra* note 1, at 6.

²⁶² Douglas A. Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992).

²⁶³ 538 U.S. 488, 494 (2003) (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998)) (internal quotations omitted).

²⁶⁴ *Id.* at 495 (citing *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932)).

²⁶⁵ *Id.* at 495–96.

As a result, the Court's Full Faith and Credit analysis has been collapsed into Due Process analysis in the choice-of-law context.²⁶⁶ Justice Stevens believes that the analysis of the two clauses are separate inquiries because the "provisions protect different interests."²⁶⁷ The Due Process Clause, which provides that no "State shall deprive any person of life, liberty, or property, without due process of law," protects individual rights, while the Full Faith and Credit Clause, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State," is designed to protect the interstate system.²⁶⁸ Justice O'Connor, writing for the Court in *Hyatt*, acknowledged that the Court had been previously unsuccessful in finding an approach to resolve state law conflicts under the Full Faith and Credit Clause, but refused to do so stating, "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."²⁶⁹

By failing to create clear choice-of-law rules or a separate approach from the one applied to due process inquiries to deal with conflicts between state laws when the Full Faith and Credit Clause is invoked, the Court has gone down the problematic paths that Justice Robert H. Jackson identified in his 1945 article, *Full Faith and*

²⁶⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) ("This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause. In each instance, the Court has examined the relevant contacts and resulting interests of the State whose law was applied . . . Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice-of-law decisions, . . . the Court has since abandoned the weighing-of-interests requirement."); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 735 n.2 (1988) (Brennan, J., concurring) ("The minimum requirements imposed by the Due Process Clause are, in this context, the same as those imposed by the Full Faith and Credit Clause.")

²⁶⁷ *Allstate Insurance Co.*, 449 U.S. at 321–22 (Stevens, J. concurring).

²⁶⁸ See U.S. CONST. amend. XIV, § 1; U.S. CONST. art. IV, § 1.

²⁶⁹ *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495–99 (2003).

*Credit—The Lawyer’s Clause of the Constitution.*²⁷⁰ Although Justice Jackson did not find comfort in the prospect of the Court creating a uniform approach to choice-of-law problems, he did identify the confusion and difficulties that would arise if the Court did not adopt an approach to Full Faith and Credit in relation to public acts:

[T]he available courses from which our choice may be made seem to be limited. One is that we will leave choice of law in all cases to the local policy of the state. This seems to me to be at odds with the implication of our federal system that the mutual limits of the states’ powers are defined by the Constitution. It also seems productive of confusion, for it means that choice among conflicting substantive rules depends only upon which state happens to have the last word. And that we are not likely to accept such a principle is certainly indicated by the Court’s sporadic interferences with choice of law, whether under the rubric of due process, full faith and credit, or otherwise. A second course is that we will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the other course is to be guided or predicted. This seems to me about where our present decisions leave us. Third, we may candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions under the full faith and credit clause which the Court may properly decide and as to which it ought at least to mark out reasonably narrow limits of permissible variation in areas where there is confusion.²⁷¹

²⁷⁰ Jackson, *supra* note 1, at 26–27.

²⁷¹ *Id.*

The first and second options identified by Jackson, that choice-of-law policy is left to the states and the Court inserts itself intermittently without adopting a choice-of-law approach,²⁷² accurately describe the current state of the Court's Full Faith and Credit jurisprudence on public acts. The Court acknowledged as much in *Hyatt*:

As Justice Robert H. Jackson . . . aptly observed, 'it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.'²⁷³

However, the Court's opinion in *Hyatt* indicates that the Court is not inclined to try to create guiding standards or a balancing approach for resolving state law conflicts and would only be disposed do so if the right case landed on its docket.²⁷⁴

Additionally, the Court has declared that judicial creation of federal common law is only warranted in a few, select circumstances.²⁷⁵ In creating federal common law, the Court has stated that "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown."²⁷⁶ Arguably, the interest in national uniformity in the administration of bankruptcy cases is a federal policy or interest that is violated by the application of non-uniform state choice-of-law rules; however, the courts have disagreed on that point.²⁷⁷

²⁷² *See id.*

²⁷³ *Hyatt*, 538 U.S. at 496 (quoting Jackson, *supra* note 1, at 16.).

²⁷⁴ *See id.* at 498–99.

²⁷⁵ *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997) (citing *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994)).

²⁷⁶ *Id.* at 218 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

²⁷⁷ *Compare* *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) ("The value of national uniformity of approach need not be subordinated, therefore, to differences in state choice of law rules.") *with* *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir.

Although Congress has also been reluctant to use its power under the Full Faith and Credit Clause, it is better suited to address the choice-of-law issue. Moreover, bankruptcy presents Congress an opportunity to legislate choice-of-law rules in a discrete area of law. From an institutional perspective, Congress is used to balancing interests. Every time Congress drafts a new piece of legislation, it balances the interests of different constituencies and makes difficult choices. In crafting legislation, Congress has the advantage of being able to approach issues in a holistic manner, instead of dealing with issues on a case-by-case basis, as the courts must do. Instead of considering one fact pattern, Congress can look at the big picture in drafting choice-of-law rules. Furthermore, the legislative process affords Congress several advantages—the ability to hold hearings, consider the testimony of a wide variety of scholars and experts, and gather as much information as is necessary to analyze the possible approaches to choice-of-law in the bankruptcy context. In addition, the federal legislative process affords all fifty states the ability to engage in the debate over choice-of-law rules through their senators and representatives. Finally, Congress has exhibited its ability to deal with these issues in the bankruptcy context by creating a choice-of-law rule to determine which state’s exemptions a debtor is entitled to claim.²⁷⁸

CONCLUSION

American conflict of laws professors have been engaged in a discussion over drafting a Third Restatement of Conflict of Laws for over ten years, yet the debate continues.²⁷⁹ The states are following a wide variety of state choice-of-law methodologies that produce different outcomes in similar cases depending on which state’s choice-of-law rules are applied. These inconsistent outcomes are at odds with

2001) (“We find no such federal policy or interest that would be violated, in this case, if the choice of law rules of the forum state were utilized.”).

²⁷⁸ 11 U.S.C. § 522(b)(3)(A) (2006).

²⁷⁹ SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 22, ¶ 374.

the uniform nature of the federal bankruptcy system and impact both debtors and creditors.

The Supreme Court has not provided guidance to the federal courts on whether state or federal choice-of-law rules should be applied in federal question cases, and as a result, the circuits are split. Because the Supreme Court is reluctant to create federal common law and Congress, as an institution, is better suited to enact choice-of-laws and has the constitutional authority to do so, Congress should enact federal choice-of-law rules for bankruptcy cases. A set of federal choice-of-law rules for bankruptcy cases would resolve an issue with which the federal courts have been grappling for over sixty years and ensure uniform treatment of debtors and creditors confronting choice-of-law issues in the bankruptcy context.